

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 BAYFIELD RESOURCE COMPANY and
3 FUTUREWISE,

Case No. 07-2-0017c

4 Petitioners,

5
6 v.

**ORDER ON COUNTY'S MOTION TO
DISMISS FUTUREWISE'S PETITION
FOR REVIEW**

7 THURSTON COUNTY,

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9 Respondent

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12 THIS Matter comes before the Board upon the motion of Thurston County for an order
13 dismissing the petition for review filed by Petitioner Futurewise in this case number.¹

14 Futurewise and fellow petitioner, Adams Cove Group, oppose the County's motion.²

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16 A telephonic hearing on the motion was held on January 10, 2007. The County was
17 represented by its attorney, deputy prosecutor Jeffrey Fancher. Futurewise and Adams
18 Cove Group were represented by their attorney Keith Scully. Petitioner Bayfield Resources
19 was represented by its attorney Eric Laschever. All three board members attended,
20 Margery Hite presiding.

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22 **DISCUSSION**

23 **Positions of the Parties**

24 The County argues that the sole issue posed by Futurewise is the sufficiency of the variety
25 of rural densities in the Rural Element of the County's comprehensive plan. Such an issue,
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32 ¹ Respondent's Motion to Dismiss Petitioner Futurewise, December 10, 2007 ("County's Motion" hereafter).

² Adams Cove Group and Futurewise' Response to Motion to Dismiss, December 17, 2007 ("Petitioners' Response" hereafter).

1 the County urges, is appropriate in a seven-year review pursuant to RCW 36.70A.130 but is
2 not implicated by the limited comprehensive plan amendment adopted in Resolution 13885.³

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4 The County further argues that the question of the sufficiency of the variety of rural densities
5 in the County's comprehensive plan is on appeal and this Board has ordered a stay of its
6 compliance order on that issue.⁴ The adoption of Resolution 13885 and Ordinance 13884
7 was not based on achieving a variety of rural densities, the County points out, but upon the
8 need to protect critical areas.⁵ Therefore, the County maintains, the Board lacks jurisdiction
9 to decide the question of whether the amendments to the comprehensive plan and
10 development regulations comply with the GMA requirement for a variety of rural densities.⁶

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12 Futurewise counters that every adoption of a comprehensive plan amendment and/or a
13 development regulation must comply with the GMA: "All amendments to the rural element
14 and development regulations applicable to the rural element must comply with RCW
15 36.70A.070(5)."⁷ Futurewise points out that it had to file a petition for review of the
16 ordinance and resolution at issue in this case or risk losing its opportunity to challenge them
17 until the next update required under RCW 36.70A.130.⁸

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20 Futurewise asserts that the only issue is whether the version of the comprehensive plan and
21 development regulations amended by Ordinance 13884 and Resolution 13885 complies
22 with the GMA, not whether a previous version was compliant.⁹

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29 ³ Memorandum in Support of Respondent's Motion to Dismiss Petitioner Futurewise at 1-2 ("County's
Memorandum" hereafter).

30 ⁴ *Ibid* at 2.

31 ⁵ *Ibid* at 3.

32 ⁶ RCW 36.70A.070(5)(b).

⁷ Petitioners' Response at 3.

⁸ *Ibid* at 4.

⁹ *Ibid*.

1 **Board Discussion**

2 The petition for review filed by Futurewise and Adams Cove Group in this case raises only
3 one issue:

4 Does the adoption of Ordinance 13884 and Resolution 13885 fail to provide for a
5 variety of rural densities by failing to designate sufficient lands at densities of less
6 than 1 dwelling unit per 5 acres in the locations and quantities required by RCW
7 36.70A.020(2, 8-10), 36.70A.040, 36.70A.070, and 36.70A.130?

8 The requirement to provide for a variety of rural densities is found in RCW 36.70A.070(5)(b):
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10 Rural development. The rural element shall permit rural development, forestry, and
11 agriculture in rural areas. The rural element shall provide for a variety of rural
12 densities, uses, essential public facilities, and rural governmental services needed to
13 serve the permitted densities and uses. To achieve a variety of rural densities and
14 uses, counties may provide for clustering, density transfer, design guidelines,
15 conservation easements, and other innovative techniques that will accommodate
16 appropriate rural densities and uses that are characterized by urban growth and that
17 are consistent with rural character.

18 RCW 36.70A.070(5)(b)

19 This requirement applies to the rural element of the comprehensive plan. The
20 comprehensive plan was amended by Resolution 13885.¹⁰

21 Resolution 13885 amends the comprehensive plan to add two rural land use categories –
22 Rural (residential density 1 dwelling unit per 20 acres) or R 1/20; and Rural (residential
23 density 1 dwelling unit per 10 acres) or R 1/10.¹¹ It allocates 3.2% of the total rural and
24 resource lands to the R 1/20 category and 1% of the total rural and resource lands to the R
25 1/10 category. Resolution 13885 also reduces the lands allocated to the rural residential
26 density of 1 dwelling unit per 5 acres or R 1/5 from 50.5% to 46.6%; and increases the
27 allocation of lands for limited areas of more intensive rural development or LAMIRDs from
28 3.2% to 3.5%.¹²

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32 ¹⁰ Ordinance 13884 adopts development regulations to implement the changes in the comprehensive plan.

¹¹ Resolution 13885, Attachment B at 5.

¹² *Ibid* at 6.

1 Futurewise concedes that the addition of the two rural land use categories – R1/10 and
2 R1/20 – increases the variety of rural densities provided in the Rural Element of the
3 County’s comprehensive plan. However, Futurewise argues that the amount of lands and
4 the location of lands in the new land use categories are insufficient to meet GMA
5 requirements for “a variety of rural densities.”
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7 The question presented by the County’s motion is the scope of the Board’s review of a
8 comprehensive plan amendment which is not made pursuant to a RCW 36.70A.130(1) and
9 (4) update. The County argues that a challenge to the sufficiency of the rural densities
10 requirements for the Rural Element is an update question and cannot be raised when the
11 amendment does not repeal or revise the entire Rural Element. Further, the County points
12 out, the parties agree that the amendment actually improves the compliance of the Rural
13 Element with the GMA requirements for rural densities.
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16 The problem with this part of the County’s argument is it would restrict a petitioner from
17 challenging the sufficiency of the variety of rural densities unless there had been a complete
18 update of the Rural Element. It is easy to imagine that a comprehensive plan amendment
19 could be adopted which *decreased* the variety of rural densities. That is clearly not the case
20 here; but were the Board to decide that there could be no challenge to the sufficiency of the
21 variety of rural densities unless the entire Rural Element were repealed, it would mean that
22 an otherwise compliant Rural Element could be made non-compliant without review simply
23 because the amendment did not repeal and revise the entire Rural Element. The Board
24 finds no basis for such a limitation on board review in the GMA.
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27 On the other hand, the County correctly points out that the Petitioners’ position is that the
28 Rural Element was not compliant before the amendments adopted in Resolution 13885 and
29 the challenged amendments do not make it compliant, even though they make it better.
30 Thus, the County urges, the Petitioners are seeking to challenge unamended portions of the
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1 comprehensive plan, portions which must be presumed valid, rather than the new portions,
2 with which the Petitioners have no quarrel.¹³

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4 While this position has appeal on first blush, on further consideration it is apparent that the
5 Board would have to first determine whether a given amendment improves or worsens a
6 comprehensive plan. This is somewhat analogous to the position the County took with
7 respect to the scope of an update in its argument to the Court of Appeals. As the Court
8 said:

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10 The County's proposal would require the Board to determine whether an amendment
11 to the Act made a requirement stricter or merely changed it. The County does not
12 define stricter. We presume that it would be an amendment to the Act that requires
13 the County to more strictly regulate an owner's land use. If so, and the legislature
14 amended the Act to mandate what might be arguably less strict land use controls, the
15 County would not be obligated to revise its comprehensive plan in accordance with
16 the amendment. Thus, a land owner could not challenge a county's failure to relax its
17 land use controls under the Act's amendments. We doubt that the legislature
18 intended such an uneven result. We also question whether the legislature intended
19 to burden the Board with the threshold jurisdictional question of whether an Act
20 amendment is stricter, less strict, or somewhere in between what the Act required
21 before the amendment. Finally, the Board did not see fit to impose such a limitation
22 on its review of periodic updates an interpretation we give considerable deference.
23 City of Redmond, 136 Wn.2d at 46.

24 We conclude that the Board did not err in interpreting RCW 36.70A.130 to allow the
25 Board to review unchanged portions of the County's comprehensive plan and
26 development regulations.¹⁴

27 To paraphrase the Court of Appeals, in order to adopt the County's theory with respect to
28 board jurisdiction over comprehensive plan amendments, the Board would first have to
29 determine whether the comprehensive plan amendment is an improvement, a worsening, or
30 somewhere in between. How the Board would make such a determination is not apparent.

31 ¹³ RCW 36.70A.320 and 36.70A.290(2)

32 ¹⁴ *Thurston County v. Western Washington Growth Management Hearings Board*, 137 Wn.App. 781,793, 154 P.3d 959 (2007).

1 The County further argues that the changes in rural land use categories were not adopted to
2 achieve a change in the variety of rural densities but for the purpose of protecting critical
3 areas in specific geographic regions of the County. Resolution 13885 provides that the
4 R1/20 designation:

5 Will reduce housing densities and avoid incompatible uses in environmentally
6 sensitive and hazardous areas such as the Black River Corridor, the Nisqually Bluff,
7 and on parcels completely covered by critical areas, thereby helping to protect public
8 health, safety and welfare; ...¹⁵

9 It also provides that the R 1/10 designation:

10 Will reduce development in environmentally sensitive and hazardous areas such as
11 the flood prone Salmon Creek Basin and lands lying over aquifers with elevated
12 chloride levels, thereby helping to protect public health, safety and welfare;...¹⁶

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14 However, Futurewise counters that an enactment adopted for one purpose could
15 nonetheless have an unintended effect on compliance in another respect. The Board
16 agrees that the purpose of the enactment does not foreclose a challenge to the impact of
17 the enactment on another requirement or goal of the GMA.

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19 At the same time, the jurisdiction to review a comprehensive plan amendment extends only
20 to the changes adopted. Matters which were not altered by the comprehensive plan
21 amendment are not open to challenge simply because there was a comprehensive plan
22 amendment. The changes themselves are what is at issue:

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24 Any amendment of or revision to a comprehensive land use plan shall conform to this
25 chapter. Any amendment of or revision to development regulations shall be
26 consistent with and implement the comprehensive plan.¹⁷

27 While the compliance of those changes with the GMA includes any impacts of those
28 changes on the plan overall, the fact that the County has amended its Rural Element does
29 not necessarily put the entire Rural Element at issue.
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32 ¹⁵ Resolution 13855 at 2

¹⁶ *Ibid.*

¹⁷ RCW 36.70A.130(1)(d)

1 In terms of the Futurewise petition here, the Board starts from the presumption of validity.¹⁸
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3 The comprehensive plan as a whole is presumed valid and cannot be challenged because
4 the time for filing a petition for review of the comprehensive plan as a whole has passed.¹⁹
5 In this case, the County's update of its comprehensive plan in 2004 was challenged on the
6 basis of the lack of variety of rural densities. However, the review of that issue must await
7 the decision of the Washington Supreme Court regarding the County's update of its
8 comprehensive plan in a different case. *Thurston County v. Western Washington Growth*
9 *Management Hearings Board*, 137 Wn.App. 781,793, 154 P.3d 959 (2007), petition for
10 review filed.
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12 As to the present challenge, the amendment is also presumed valid but it is subject to
13 challenge by virtue of the timely filing of the petition for review of Resolution No. 13855.
14 Thus the issue before the Board in the Futurewise petition is whether the change to the
15 comprehensive plan adopted in Resolution No. 13855 complies with the variety of rural
16 densities requirements of the Act.
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19 In the ordinary case, it is unlikely that it makes much difference whether the Board is
20 reviewing the comprehensive plan as amended or the amendment to the comprehensive
21 plan – the result is typically the same. However, in this case, the Petitioner concedes that
22 the amendment itself is not the problem.²⁰ Petitioners are, instead, arguing that the
23 underlying comprehensive plan was non-compliant as to a variety of rural densities and the
24 amendment, while an improvement, does not go far enough to achieve compliance.
25 While the Board determines that we have subject-matter jurisdiction to decide the
26 compliance of the amendments to the comprehensive plan with the variety of rural densities
27 requirements of the GMA, we wish to be clear as to the scope of the Board's review.
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32 ¹⁸ RCW 36.70A.320

¹⁹ RCW 36.70A.290(2)

²⁰ Oral argument.

1 The issue is whether the amendment complies with the GMA, presuming an underlying
2 compliant comprehensive plan; rather than whether the comprehensive plan as amended
3 complies with the GMA. Thus the question isn't whether the comprehensive plan as
4 amended complies with the GMA but whether the change it makes complies with the GMA.
5 In deciding the Futurewise challenge, the Board will look at what was changed, including
6 how the change impacts the rest of the comprehensive plan. The Board will not, however,
7 revisit the question of whether the underlying comprehensive plan was compliant as to the
8 requirement for a variety of rural densities. That question is part of the Board's decision
9 upon which review has been requested by the County before the Washington Supreme
10 Court. *Thurston County v. Western Washington Growth Management Hearings Board*, 137
11 Wn.App. 781,793, 154 P.3d 959 (2007), petition for review filed. In this case, the Board will,
12 instead, look to whether the amendments adopted in Resolution 13855 (and the
13 implementing regulations in Ordinance 13854 to the extent implicated in the issue) are
14 themselves non-compliant in changing a presumptively compliant comprehensive plan into a
15 non-compliant one.²¹
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19 While denying the County's motion for dismissal on jurisdictional grounds, the Board would
20 accept a stipulation from the parties that the ruling on the scope of review effectively
21 decides the Futurewise challenge. Such a stipulation would, together with this order,
22 constitute a final order for purposes of appeal. On the other hand, if Futurewise wishes to
23 pursue its petition within the parameters of the Board's ruling here on the scope of review,
24 then this matter will go forward to a hearing on the merits.
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31 ²¹ The waters are muddied on this issue by virtue of the update case which is on appeal to the Washington
32 Supreme Court. Depending upon the Court's resolution of that appeal, the question of the compliance of the
Rural Element with RCW 36.70A.070(5)(b) as part of the County's update in 2004 may return to this Board for
determination. However, that case arises on challenges to the sufficiency of the County's update, not on the
basis of a specific comprehensive plan amendment.

ORDER

Based on the foregoing, the County's motion to dismiss the petition for review filed by Futurewise is hereby DENIED.

Entered this 17th day of January 2008.

Margery Hite, Board Member

Holly Gadbow, Board Member

James McNamara, Board Member

This is not a final order within the meaning of RCW 34.05.542. It will become a final order upon entry of the Final Decision and Order in this case.

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